B

No. 05-1589, 05-1657

IN THE

Supreme Court of the United States

GARY DAVENPORT, *et al.*,
Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,
Respondent.

WASHINGTON,
Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,
Respondent.

On Writs of Certiorari to the Supreme Court of Washington

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the restriction imposed by Wash. Rev. Code § 42.17.760 on respondent Washington Education Association's First Amendment right to use funds lawfully in its possession for political speech is justified by a compelling governmental interest either in protecting the public interest in the integrity of the electoral process or in providing additional protection for the First Amendment rights of individual union nonmembers who pay agency fees.

CORPORATE DISCLOSURE STATEMENT

Respondent Washington Education Association is organized as a nonprofit corporation. It has no parent corporation, and no publicly held company owns any stock in it.

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STATEMENT

A. *Factual Background*

1. Respondent Washington Education Association ("WEA") is a labor organization whose 370 local affiliates act as the exclusive bargaining representatives for over 70,000 teachers and other education employees of public school districts, community colleges, and universities in the State of Washington under Washington's Educational Employment Relations Act, Wash. Rev. Code §§ 41.59.010 *et seq.*, and other statutes governing public-sector employment relations.[1] Joint Appendix ("J.A.") 77, 83.

Like most unions, WEA works to advance the interests of the employees it represents through a variety of forms of concerted activity. First and foremost, WEA assists its local affiliates in negotiating and enforcing collective bargaining agreements governing terms and conditions of employment. But because decisions made by the legislature and through ballot initiatives and local tax levies determine educational policy and funding and thus have a direct impact on the conditions of teachers' employment, WEA believes it essential to its ability effectively to advance the interests of the education employees it represents to engage in various forms of political advocacy as well. J.A. 140-43. During the years at issue in this litigation, WEA's election-related spending from its general treasury fund that was required to be reported to the state Public Disclosure Commission (not including internal communications) varied between less than 1% and

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[1] While the vast majority of the employees WEA represents are certificated employees covered by the Educational Employment Relations Act, WEA also represents some classified employees who are subject to the Public Employees' Collective Bargaining Act, Wash. Rev. Code §§ 41.56.010 *et seq.*, as well as community college and university faculty members, whose labor relations are governed respectively by Wash. Rev. Code §§ 28B.52.010 *et seq.* and §§ 41.76.001 *et seq.*

just over 3% of WEA's total expenditures in those years. J.A. 175-76, 192-93; Report of Proceedings ("R.P.") 760-65.

With the exception of in-kind contributions to cover the administrative expenses of WEA's separate political action committee, all of WEA's reportable political contributions and expenditures were made in support of or in opposition to various ballot propositions submitted to the electorate at the state and local levels. Although Washington law permits corporations and labor organizations to make contributions and expenditures in support of candidates for political office from their general treasury funds, WEA in fact made no such treasury fund contributions or independent expenditures in connection with candidate elections. J.A. 126, 154-55. Instead, WEA maintained a separate political action committee, WEA-PAC, funded by voluntary contributions of WEA members over and above their dues payments, which made contributions and expenditures in support of political candidates. J.A. 154-55. (WEA-PAC contributions and expenditures are not at issue in this litigation.)

Of WEA's political contributions and expenditures with respect to ballot propositions, a portion—consisting largely of in-kind contributions—went to committees supporting local tax levies submitted to the voters in various school districts. Pl. Trial Ex. 6, 12, 16; R.P. 282, 293, 299. The rest were contributions to political committees supporting or opposing statewide ballot measures, notably four initiatives submitted to the electorate at the 1996 and 2000 general elections: In 1996, WEA opposed Initiatives 173 and 177, relating to school vouchers and charter schools, because of the negative impact it believed those initiatives would have had on public education funding and employment, J.A. 144-46, while four years later it supported both Initiative 728 to reduce class size in the public schools and Initiative 732 to provide cost-of-living adjustments for education employees. J.A. 125-26, 146-48; R.P. 303-05.

2. Of the education employees WEA represents, just over 95% have chosen to join WEA as union members and accordingly pay union dues into WEA's general fund from which the union finances its activities. The remainder of the WEA-represented employees, fewer than 5%, have chosen not to become union members. Def. Trial Ex. 57-61; R.P. 180.

Washington law requires that a public-sector union must represent, on an equal basis, all employees in the bargaining units for which it is certified as exclusive bargaining representative, "without regard to [the employee's] membership in that bargaining representative." Wash. Rev. Code § 41.59.090; *see also id.*, §§ 41.56.080, 41.76.015. To spread the financial burden of this required equal representation of union members and nonmembers, Washington—like most of the states that provide for public-sector collective bargaining, and like federal law with respect to private-sector employment—permits public-sector unions to negotiate collective bargaining agreements that require payment of an "agency fee" to the union by the employee-nonmembers the union is required to represent. Wash. Rev. Code § 41.59.100; *see also id.*, §§ 28B.52.045, 41.56.122, 41.76.045. Washington law sets the agency fee to be collected pursuant to such a provision at an amount "equal to the fees and dues required of membership in the [union]." Wash. Rev. Code § 41.59.060(2); *see also id.*, § 41.59.100.

This Court has long recognized the important public purposes served by an agency fee system and the permissibility of that system under the First Amendment. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 220-22 (1977). At the same time, in deference to the employee-nonmembers' First Amendment nonassociational rights, the Court has ruled that nonmembers who object to paying for a union's political and ideological activities can only be required to pay a reduced agency fee that is equal to the portion of union dues that is expended for purposes germane to collective bargaining. *See*

Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991). In addition, the Court has held that unions that have negotiated an agency fee provision must give nonmembers notice of the amount and nature of the union's germane and non-germane expenditures and the opportunity to object to paying the portion of the agency fee that corresponds to the latter. *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

Consistent with these constitutional requirements, WEA annually provides each employee-nonmember subject to an agency fee requirement with a "*Hudson* notice" explaining the union's breakdown of its germane and non-germane expenditures for the relevant fiscal year and offering, to any nonmember who informs the union of his or her objection, a rebate of that portion of the fee that represents the nonmember's *pro rata* share of the union's non-germane expenditures. J.A. 194-207. In accordance with this Court's teaching, *see Abood*, 431 U.S. at 241, the nonmember wishing to object need only send to WEA headquarters a "general statement of objection," J.A. 198; no further justification or explanation of the nature of the objection is required.

Typically, about three-quarters of WEA's total expenditures are deemed chargeable to objecting nonmembers, while the remaining 25%—including not only the election-related expenses at issue here, but also WEA's expenditures for purposes such as lobbying, public relations, organizing, donations, and member-only benefits—is treated as nonchargeable to objectors. J.A. 203-07; R.P. 339. Thus, for example, the *Hudson* notice for the 2000-01 fiscal year informed nonmembers that 75.7% of WEA's expenditures were germane to collective bargaining, J.A. 201, and accordingly any nonmember who objected to paying the portion of the agency fee corresponding to WEA's political and other non-

germane expenditures was entitled, upon request, to a 24.3% reduction in the fee.[2]

Payroll deductions received by WEA from employers, consisting of the union dues of members and the agency fees of nonmembers, are deposited in WEA's general fund, from which WEA makes all of its disbursements, including the political expenditures that are at issue in this litigation. J.A. 101; R.P. 127, 130-31.[3] During the years 1996-2000, dues paid by WEA members made up approximately 84.5% of WEA's total revenues that went into the general fund, while just under 4.3% of those total revenues came from nonmembers' agency fees, with the remainder attributable to interest and other miscellaneous income. J.A. 192-93; R.P. 760-61.

B. *The Statute*

In 1992 Washington voters adopted through Initiative 134 a Fair Campaign Practices Act ("Act"), which amended and added new provisions concerning campaign contribution limitations to Washington's campaign finance and lobbying disclosure law in Title 42, Chapter 17 of the Washington Revised Code. The initiative was sponsored by "senators from one political party" following the defeat of a similar bill during the 1991 legislative session. *State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 999 P.2d 602, 605 (Wash. 2000).

The text of the Act recites "findings" concerning rapidly increasing campaign costs and the disproportionate influence

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[2] In addition, any fee payer who so requests is entitled to a review by an independent arbitrator of the union's calculation of the percentage of its expenditures that is chargeable to objectors. J.A. 197.

[3] Any agency fees received from employers before nonmembers have had the opportunity to object and request refunds are held in escrow until, following the nonmember's objection, the nonchargeable portion is refunded, with interest, to the objector and the chargeable portion is transferred to WEA's general account. J.A. 95-99; R.P. 147-48.

of financially affluent entities on the election of candidates, with the attendant perceptions of undue influence of large contributors on public officials. Wash. Rev. Code § 42.17.610. The Act then declares its "intent":

> By limiting campaign contributions, the people intend to:
>
> (1) Ensure that individuals and interest groups have fair and equal opportunity to influence elective and governmental processes;
>
> (2) Reduce the influence of large organizational contributors; and
>
> (3) Restore public trust in governmental institutions and the electoral process.

Id., § 42.17.620.

Unlike federal law and that of some states, the Act does not prohibit corporations or labor organizations from making political contributions from their general treasury funds, but instead establishes dollar limits on contributions to candidates for public office, which apply alike to corporations, labor organizations, and individuals. Wash. Rev. Code § 42.17.640. Two provisions of the Act, however, specifically target union political activities. One of them, Section 680(3), instituted a requirement of annual written authorization for payroll deductions made to political committees or otherwise designated for political contributions, Wash. Rev. Code § 42.17.680(3) (1993) (subsequently replaced by an annual notification requirement, *see* 2002 Wash. Laws ch. 156, § 1).

The other provision is the one at issue in this litigation. Section 760 of the Act applies solely to labor organizations, and it is the only portion of Initiative 134—or indeed of Chapter 42.17 of the Washington Revised Code—that even mentions agency fees:

> A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to

> influence an election or to operate a political committee, unless affirmatively authorized by the individual.

Wash. Rev. Code § 42.17.760. On its face, Section 760 applies to all unions within the state, including those in the private sector.

Section 760's restriction on union political contributions and expenditures is not confined to contributions to political candidates and expenditures relating to elections for public office. Rather, the statutory definitions make clear that Section 760 also restricts the ability of labor organizations to make contributions and expenditures relating to ballot initiatives and referenda. Thus, "election" is defined to include any "election for public office and any election in which *a ballot proposition is submitted to the voters*," Wash. Rev. Code § 42.17.020(17) (emphasis added), while a "political committee" is an entity making expenditures "in support of, or opposition to, any candidate *or any ballot proposition*." Wash Rev. Code § 42.17.020(38) (emphasis added). Section 760 is the only provision of Washington law that prohibits the use of funds for contributions or expenditures relating to ballot propositions.

Washington law establishes an administrative agency, the Public Disclosure Commission ("PDC"), that is charged with the administration and enforcement the campaign finance and lobbying disclosure provisions of Title 42, Chapter 17, including the Fair Campaign Practices Act and Section 760. *See* Wash. Rev. Code §§ 42.17.350-471. Prior to this litigation, the PDC had never sought to enforce Section 760, nor had that section been the subject of any judicial interpretation, agency rulemaking, or other guidance from the PDC. *See* Appendix to Petition for Certiorari in No. 05-1657 ("Pet. App.") 9a. Indeed, the PDC had specifically declined union requests that it provide guidance on how to comply with Section 760. *Id.*; R.P. 650-62.

C. *Proceedings Below*

1. The lawsuit brought by the State's Attorney General on behalf of the PDC, which is the subject of No. 05-1657, was initiated in October 2000 in response to a complaint filed with the Attorney General by the Evergreen Freedom Foundation ("Evergreen"), an advocacy organization that has repeatedly pursued charges and litigation against WEA under the Fair Campaign Practices Act. J.A. 158-59. Evergreen's complaint alleged that WEA, from "general dues and the fees of non-members," was making contributions to its political action committee and to "ballot-issue political committees." Def. Trial Ex. 162; R.P. 570.[4]

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[4] Evergreen's attempt in its *amicus* brief to portray WEA as a scofflaw with respect to the Act, Evergreen Br. at 9-10, indicates less about WEA's willingness to comply with the law than it does about Evergreen's efforts to press the Act into the service of its own political agenda through vexatious litigation. *See State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 49 P.3d 894 (Wash. Ct. App. 2002) (rejecting Evergreen's contention that WEA constituted a "political committee" within the meaning of the Act); *State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 999 P.2d 602 (Wash. 2000) (rejecting Evergreen's contention that the Wash. Rev. Code § 42.17.680(3) requirement of annual written authorization for payroll deductions for political purposes applied to deductions for union dues). Those of Evergreen's charges against WEA that the PDC elected to prosecute were resolved by a 1998 settlement agreement in which the PDC acknowledged that most of the violations of the Act had been unintentional and had resulted from misunderstanding of the Act's reporting requirements. *See* Def. Trial Ex. 93, R.P. 484-89.

Ironically, the instant lawsuit resulted from WEA's attempt to comply with the 1998 settlement agreement. Prior to November 1996, WEA made the kinds of political expenditures that form the basis for the State's prosecution of this lawsuit from a separate Community Outreach Program account ("COP"), which was funded by a membership dues supplement that nonmembers did not pay. After the PDC took the position that this designation of COP funds for political purposes made COP a "political committee" subject to the restrictions of Wash. Rev. Code § 42.17.680(3), WEA changed its practice, in order to avoid the problem identified by the

After Evergreen's complaint was forwarded to the PDC for investigation, WEA stipulated that it had "deposited into its general fund agency fee money" and that this "general fund money was used to make contributions and expenditures to influence an election and to operate a political committee." J.A. 80.[5] Finding, on that basis, "apparent multiple violations of RCW 42.17.760 by the Respondent WEA," the PDC referred the case to the Attorney General for prosecution. Pet. App. 119a-120a. The complaint subsequently filed by the Attorney General in Thurston County Superior Court alleged violations of Section 760 between 1996 and 2000 based on the fact that "the WEA has expended funds from its general treasury for political contributions described in RCW 42.17.760." J.A. 78.

Following discovery, WEA moved for summary judgment and the State moved for partial summary judgment. Granting the State's motion, the trial court held (i) that Section 760 was constitutional; and (ii) that an agency fee payer's failure, in response to WEA's "*Hudson* notice," to file an objection and request a reduction in his or her agency fee corresponding to WEA's non-germane expenditures did not constitute "affirmative authorization" within the meaning of the statute. Pet. App. 117a. The trial court determined, however, that there

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PDC, by making such political expenditures instead from general treasury funds. *See* Def. Trial Ex. 93. In the 1998 settlement agreement the PDC expressly "acknowledge[d] and agree[d] that WEA legally may use its general treasury funds for these activities . . . ." *Id.* at 8, ¶ 4. After having specifically declined requests that it provide guidance to unions on how to comply with Section 760, and on that provision's interface with Section 42.17.680(3), *see* Pet. App. 9a; R.P. 650-62, the PDC brought the instant lawsuit against WEA based on the use of general treasury funds for political advocacy that the PDC had specifically approved in the 1998 settlement.

[5] The stipulation, which the trial court determined was applicable only to the 1999-2000 fiscal year, R.P. 20-22 (3/23/01 hrg.), also acknowledged that, by doing so, "Respondent committed multiple violations of RCW 42.17.760." J.A. 81.

were issues of fact as to whether, by making political expenditures and contributions from its general fund, WEA "ha[d], in fact, used agency fe[e]s to influence an election or to support a political committee," *id.*, and the court accordingly conducted a five-day bench trial on that question.

Two of the three accountants to testify at trial, including an independent expert retained by both parties, opined that, under the circumstances at issue in this case, the mere commingling of agency fees in WEA's general fund was an insufficient basis for concluding that WEA had "used" such fees for the political purposes identified by Section 760. J.A. 161-63, 175-78, 192-93; R.P. 760-61. Testifying for the State, on the other hand, accountant Jeffrey Baliban opined on direct examination that "to whatever extent political expenditures are made out of [a] commingled account, a proportionate amount of fee payer money is used" for that purpose. J.A. 131. Baliban explained the theory upon which the State prosecuted the case as follows:

> Q. Now, . . . assume you have a fund where there are commingled funds . . . of dues and fees and other revenues, and the organization . . . wants to use some of that money for political expenditures, it's your view that the only way they can do that because of your proportionality premise is by having affirmative authorizations, correct?
>
> . . .
>
> A. Every single fee payer that contributed to that fund has to give you affirmative authorization.

J.A. 132-34.

Adopting that theory, the trial court held that "when agency fees were commingled with other funds in the general treasury, expenditure of *any general treasury monies* to influence an election or support a political committee results in use of a proportionate share of agency fees for such purposes." Pet. App. 99a (emphasis added). The court elab-

orated: "[A]gency fees were placed into the general fund and were spent each year as the WEA determined appropriate. . . . This is a clear-cut *use* of the total funds available for the given purposes in proportion to the source of the funds." *Id.* at 106a-107a (emphasis in original). Doing this without all fee payers' affirmative authorization, the court held, violated Section 760. *Id.* at 107a.

Although the court and the parties did not find it necessary to develop a comprehensive list of the election-related contributions and expenditures made by WEA from its general treasury that resulted in the finding of a Section 760 violation, the *only* evidence in the record of such contributions and expenditures is with respect to spending on ballot propositions, as well as expenses related to internal election-related communications with WEA's members and in-kind contributions covering the administrative costs of WEA's political action committee. J.A. 125-26, 144-51; Pl. Trial Ex. 2, 6, 7, 11, 12, 14, 16, 19; R.P. 276-305. In contrast, the record evidence shows that WEA did *not* make contributions or independent expenditures related to the election of candidates for public office. J.A. 126, 154-55.

Having found a violation of the statute based on the foregoing expenditures and contributions, the court assessed a civil penalty of $200,000, Pet. App. 109a, doubled that amount to $400,000 as a "punitive sanction" upon its finding that the violation was intentional, *id.* at 111a-112a, and awarded the State its costs and attorney's fees, *id.* at 112a, for a total penalty of $590,375. *Id.* at 6a.

The court also entered a permanent injunction, J.A. 208-17, requiring WEA in future years to reduce the agency fee paid by nonmembers by "the percentage of the WEA's total expenditures that are analyzed to have been used for § 760 expenses in the second fiscal year prior" plus a "cushion" of 3 percent. J.A. 212. The injunction defined Section 760 expenses to include "all political advertising expenditures, as

well as direct and in-kind contributions, internal political communications, and independent expenditures." J.A. 209.[6] In order to permit calculation of the required reduction in the agency fee, the injunction mandated extensive record-keeping, including notably that the organization "[r]ecord expenses and salaries associated with internal communications to enable identification and quantification of all expenses of any internal communications to support or oppose[] ballot propositions or candidates or [that] otherwise are made to operate a political committee or influence an election." J.A. 210.

2. In the meantime, five agency fee payers, petitioners in No. 05-1589, brought a class action lawsuit against WEA in the same court, asserting an implied private right of action under Section 760 as well as various tort theories—all predicated on the alleged violation of Section 760—and seeking to recover portions of the agency fees they had paid. J.A. 3-12. The trial judge dismissed one of the tort claims, allowed the others to go forward, certified a class as to certain claims, and stayed further proceedings while certifying his ruling for interlocutory appeal. Davenport Pet. App. 45a-49a.

3. The two cases were heard together on appeal. Reversing the trial court, the court of appeals reached only the issue of the statute's constitutionality. Relying on this Court's agency fee jurisprudence, it struck down Section 760 as unconstitutional. Pet. App. 48a; *see also* Davenport Pet. App. 42a.

Judge Hunt dissented from the majority's view that the statute was unconstitutional, Pet. App. 70a-77a, but in so doing she agreed that WEA had had a good faith basis for its

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[6] Whether Section 760 applied to a union's internal political communications with its members was disputed at trial. The court's permanent injunction adopted the position advocated by the State, according to which the statutory definition of "expenditure" to include any "payment," Wash. Rev. Code § 42.17.020(22), encompassed payments that WEA made in communicating with its members with respect to elections. *See* J.A. 87-90.

belief that it had complied with the statute, and she therefore concurred with the majority in holding that all penalties against WEA should be vacated. *Id.* at 78a. In the Davenport case, Judge Hunt concurred in the result, agreeing that the trial court's ruling should be reversed, but on the basis of an intervening appellate decision holding "that '42.17 RCW does not imply a private cause of action.'" Davenport Pet. App. 43a-44a.

4. The Washington Supreme Court granted discretionary review and affirmed the judgment of the court of appeals. Pet. App. 1a. The court addressed two issues. It first held that, although the statutory requirement of "affirmative authorization" did not mean *written* authorization, and although "the State was unable to specify what form of authorization would satisfy the requirement of affirmative authorization," *id.* at 11a, a nonmember's "[f]ailure to respond to the *Hudson* packet . . . would not fulfill the affirmative authorization requirement." *Id.* at 10a.

The Washington court therefore turned to the question whether the statute, so construed, was constitutional. Answering that question in the negative, the court held that the affirmative authorization requirement of Section 760 unconstitutionally burdened the right of WEA and its members to engage in political speech.

Citing *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), the court rejected as "disingenuous" the State's contention "that § 760 has no impact on the First Amendment rights of [union] members" and their "ability to assert their collective political voice." Pet. App. 19a. Here, the court explained, Washington law allows WEA "to collect a fee equivalent to 100 percent of union dues," *id.* at 30a (citing Wash. Rev. Code § 41.59.100), but "RCW 42.17.760 then encumbers the use of such funds by prohibiting their expenditure for political speech absent affirmative authorization by the agency fee paying nonmember." *Id.* Thus, "the

statute acknowledges that the fees are in the union's possession but places restrictions upon the *use* of the union's funds for political speech." *Id.* at 30a-31a (emphasis in original). Such "a restriction on the First Amendment rights of WEA must be justified by a *compelling* governmental interest." *Id.* at 26a (emphasis in original).

In this case, the court noted, "the only interest asserted" as justifying this restriction was "additional protection for nonmembers' First Amendment rights." *Id.* The Washington court found multiple reasons for rejecting that asserted interest as justification for the statutory restriction. In the first place the court held that protection of individual agency fee payers' First Amendment rights against compelled speech simply was *not* the purpose of the statute: "[T]he principal thrust of I-134 was to protect the integrity of the election process .... Thus, the intent of the statute is to protect the public, not individual employees." *Id.* at 12a; *see also id.* at 22a-23a ("[T]here is no indication that in voting for I-134, the voters intended to provide more protection for nonmembers than that offered under federal constitutional principles.").

Even if providing additional protection for nonmembers' First Amendment rights had been the statutory purpose, the court below found "no indication or argument that WEA is compelling nonmembers to support political activities or preventing nonmembers from asserting their First Amendment rights." *Id.* at 26a. The court found it evident that, "[a]s the Supreme Court has held, there is no compelled support if the union utilizes the *Hudson* procedures." *Id.* In other words, "[a]n employee who is given a simple and convenient method of registering dissent has not been compelled to support a political cause and has not suffered a violation of his or her First Amendment rights." *Id.* at 17a. Thus, "[g]iven that there is no compelled support [of political causes], it does not appear that there is any governmental interference with First Amendment rights of nonmembers for § 760 to protect against." *Id.* at 26a. And, in the alternative,

the restriction on unions' political expression was not narrowly tailored to protect the alleged interest: "The constitutionally acceptable opt-out alternative is significant in that it reveals that protection of dissenters' rights can be achieved through means significantly less restrictive . . . than RCW 42.17.760's opt-in requirement." *Id.* at 33a. Accordingly, the Washington Supreme Court struck down Section 760 as unconstitutional.

SUMMARY OF ARGUMENT

The restriction imposed by Section 760 on WEA's use of funds lawfully in its possession for political advocacy—notably to support or oppose ballot propositions presented to the Washington electorate—is not narrowly tailored to further any compelling governmental interest.

1. Section 760, as authoritatively construed by the Washington Supreme Court, encumbers the use of funds that are properly within the union's possession pursuant to other provisions of Washington law, by requiring that the union obtain individual authorization from nonmember fee payers if it wishes to spend its funds for purposes of political speech on election-related matters. This restriction on political speech must be judged under the standard of strict scrutiny. Section 760 is a content-based restriction that singles out political speech for special treatment, and its restrictions burden the exercise of political speech in the same way as did the restrictions on corporate expenditures to which the Court applied strict scrutiny in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*").

The arguments of petitioners and their *amici* for less searching scrutiny are precluded by those cases. The fact that WEA's receipt of agency fees was facilitated by provisions of the State's public-sector labor-relations laws does not cut against the application of strict scrutiny, for it was equally the case that the corporations whose election-related expenditures

were regulated in *Austin* and *MCFL* had benefited from significant "state-created advantages." Nor is there any merit to the suggestion that the statute regulates only WEA's use of "other people's money" and thus burdens no First Amendment interest of WEA in political expression. While the funds within the union's possession that are encumbered by Section 760 were received from others, the same was true of the corporate funds in *Austin* and *MCFL*, but the Court nonetheless applied strict scrutiny to the statutes regulating corporations' use of their general treasury funds for political speech. Petitioners' objection that Section 760 does not restrict unions' use of member dues is misplaced for the same reason; and, in addition, it flies in the face of the very theory upon which the State prosecuted and won this case.

2. Neither of the two possible justifications for Section 760—protecting the public's interest in the integrity of elections, and providing additional protection for the First Amendment nonassociational rights of individual agency fee payers—offers a compelling governmental interest to which Section 760 is narrowly tailored.

a. Section 760 cannot be justified as a regulation of campaign spending. In the first place, it sweeps far too broadly in limiting union spending not just with respect to the election of candidates for political office but also in support of or in opposition to ballot propositions submitted to the electorate. While this Court has upheld certain restrictions on unions' and corporations' use of their general treasury funds for candidate elections, it has consistently held that the rationale that justifies such restrictions—the danger of the corruption of elected representatives through the creation of political debts—does not support similar restrictions on spending treasury funds for ballot questions. *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978). This distinction is of the essence, for the principal use of its treasury funds that formed the basis for the State's prosecution of WEA—and the trial

court's finding of a violation of Section 760—was WEA's spending on ballot propositions; the undisputed fact is that WEA made *no* candidate contributions or expenditures from general treasury funds. Because of its substantial overbreadth, Section 760 is unconstitutional on its face even if it could constitutionally be applied to spending on candidate elections, or to the internal communications or PAC administration on which some of WEA's general treasury funds were spent.

A second, independent reason why Section 760 does not further a compelling interest in protecting the integrity of the electoral process is its underinclusiveness. Section 760 attempts to ensure that union electoral spending represents the views of those from whom the union's funds were obtained—while requiring no such assurance at all with respect to corporate shareholders or members who, like union agency fee payers, may harbor objections to the corporation's election-related political advocacy. The omission is perverse, because the union nonmembers with respect to whom the statute imposes its affirmative authorization requirement constitute the one class of individuals who—in contrast to corporate shareholders or members—already have the opportunity, by noting a simple objection, to prevent the use of their fees for political purposes with which they disagree. As this Court explained in *Austin*, the availability of the agency fee objection procedure means that "the funds available for a union's political activities more accurately reflects members' support for the organization's political views than does a corporation's general treasury." 494 U.S. at 663. Section 760 turns *Austin* on its head. Such underinclusiveness not only undermines the rationale for the restriction of union speech, but in the election context it raises the prospect that the political process is being skewed by one-sided regulation.

b. Nor does Section 760 further a compelling interest in protecting individual agency fee payers' First Amendment rights against compelled speech. The Washington Supreme

Court held that the statute was *not* enacted for this purpose: "The intent of the statute was to protect the public, not individual employees." Pet. App. 23a. That determination is not only authoritative but clearly correct, as shown by the statutory statements of findings and intent. And the asserted purpose of protecting fee payers' First Amendment rights is belied by the fact that Section 760 applies only to unions' *election-related* expenditures, ignoring other union political expenditures that have exactly the same impact on nonmembers' First Amendment rights.

Even if Section 760 had in fact been enacted for the purpose of protecting nonmembers' First Amendment rights, that purpose would not provide a compelling justification for the statute's restriction of WEA's political speech. The nonmember's First Amendment right lies in not being compelled to finance union political and ideological activities to which she objects, but that right already is independently protected by the objection procedures required by this Court's decisions in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and its progeny. Where, as here, the nonmember can avoid supporting the union's political activities simply by stating an objection, there is no compelled speech.

As the fee payers' First Amendment rights against compelled speech are already protected, petitioners defend Section 760 as protection for nonmembers who are "too busy" or simply "forget" to assert their objection, but such concerns are too insubstantial to justify Section 760's restrictions on political expression. Nor is there any compelling interest in protecting people from having to speak up if they wish to assert their First Amendment rights to object—especially where, as here, nothing more than a general objection, submitted by mail to the union's administrative offices, is needed.

3. Striking down Section 760 as an unconstitutional restriction of political speech would not imperil any other federal or state agency shop or campaign finance legislation.

The unconstitutionality of this *sui generis* statue that encumbers the union's use of funds lawfully in its possession does not rest on any proposition that unions have a constitutional right to receive agency fees. The states are entirely free, in regulating their public-sector labor relations, either to decline to authorize any agency fee or to authorize a fee only in an amount corresponding to the union's expenditures that are germane to collective bargaining. Nor is the validity of any extant campaign finance statue even remotely at issue here. Neither the Federal Election Campaign Act ("FECA") nor the various state laws petitioners cite share the characteristics that render Section 760 constitutionally infirm. These statutes restrict spending only with respect to candidate elections and not with respect to ballot propositions, and they impose their restrictions evenhandedly on unions and corporations alike. None would be called into question by a judgment that Section 760 unconstitutionally burdens WEA's First Amendment right to engage in political speech on ballot propositions of concern to the employees it represents.

ARGUMENT

The heart of the State's case against WEA, and the essence of the trial court's ruling in its favor, is this: WEA violated Section 760 by using its general treasury funds, derived primarily from membership dues payments and only in small part from agency fee payments, for political speech—principally speech in support of or in opposition to ballot propositions submitted to the Washington electorate—without first having secured "affirmative authorization" for that action from each of its nonmember fee payers. Such political speech is "at the heart of the First Amendment's protection." *Bellotti*, 435 U.S. at 776. Section 760 cannot survive the strict scrutiny under which restrictions on political speech must be judged, because there is no compelling interest that justifies the statute's limitation of WEA's right to speak, with

funds lawfully in its possession, on issues of public policy presented to the voters of the State.

So that there is no room for confusion on this score, we emphasize at the outset that—contrary to the assertions of petitioners and their *amici*—our contention that Section 760 does not pass constitutional muster is not in any way dependent on the proposition that unions have some constitutionally protected right to collect and use agency fees for political activity. As we discuss in Part III, those states whose laws do authorize an agency fee in public-sector employment most certainly may, consistent with the Constitution, draft those laws so as to ensure that no nonmember who pays an agency fee—whether an "objector" or not—provides even a penny of support for the union's political activity.

Of equal moment, our argument that Section 760 is unconstitutional does not turn on any assertion of a constitutional right to finance contributions to or expenditures on behalf of candidates for public office out of the union's general treasury funds (as opposed to separate political action committee funds financed by voluntary contributions). This Court's cases make clear that a state may generally prohibit such uses of union and corporate treasury funds, but no such candidate-related contributions or expenditures are at issue here.

In enacting 760, however, and in enforcing it against WEA, the State has restricted the union's First Amendment right to engage in election-related political advocacy, without narrow tailoring to advance a compelling governmental interest. For that reason the court below rightly struck down the statute as in violation of the First Amendment.

I. AS A RESTRICTION ON WEA'S POLITICAL EXPRESSION FINANCED BY FUNDS LAWFULLY IN ITS TREASURY, SECTION 760 IS SUBJECT TO STRICT SCRUTINY

A. Section 760 restricts a union's use of funds lawfully in its treasury for certain election-related purposes. As the Washington Supreme Court explained, in interpreting Section 760 and its interplay with the State's agency shop legislation:

> [U]nder the agency shop provisions, the union is entitled to collect a fee equivalent to 100 percent of union dues from nonmembers in the bargaining unit. . . . [Section 760] then encumbers the use of such funds by prohibiting their expenditure for political speech absent affirmative authorization by the agency fee paying nonmember.

Pet. App. 30a. Thus, as the court below put it, "the statute acknowledges that the fees are in the union's possession but places restrictions upon the *use* of the union's funds for political speech." *Id.* at 30a-31a (emphasis in original).[7] This restriction on the union's use, for purposes of political speech, of funds that are lawfully in its possession must be judged under the standard of strict scrutiny.

Section 760 is, in the first place, a limitation of speech on the basis of its political content, and such content-based speech limitations are subject to strict First Amendment scrutiny. With one exception, Washington permits unions to use their general treasury funds derived in part from agency fees (whether collected from public-sector employees pursuant to state law, or from private-sector employees under federal law) for any purpose or for any kind of speech—including making charitable contributions, publishing the union's views on public issues, or lobbying the legislature—without the precondition of first obtaining affirmative author-

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[7] This construction of the statute by the highest state court is, of course, authoritative. *Johnson v. Fankell*, 520 U.S. 911, 916 (1997).

ization from each and every fee payer. Only if the union chooses to make contributions or expenditures related to an election does the State impose the requirement of individual fee payer authorization.

Section 760 is, in this respect, like the statute at issue in *Burson v. Freeman*, 504 U.S. 191 (1992), which prohibited political campaigning within 100 feet of a polling place. The Court evaluated that statute through the lens of strict scrutiny as a content-based restriction on speech, because "[w]hether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign." *Id.* at 197 (plurality op.); *see also id.* at 217 (Stevens, J., dissenting); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 536-541 & n.10 (1980) (regulatory order prohibiting a utility from using its monthly billing envelopes to transmit materials on "controversial issues of public policy" was content-based and subject to strict scrutiny).

Section 760 does not simply single out political speech; it "burdens the exercise of political speech." *Austin*, 494 U.S. at 657. As this Court explained in striking down a state statute that prohibited corporations from making expenditures in connection with ballot initiatives:

> Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, "the State may prevail only upon showing a subordinating interest which is compelling," "and the burden is on the government to show the existence of such an interest." Even then, the State must employ means "closely drawn to avoid unnecessary abridgment . . . ."

Bellotti, 435 U.S. at 786 (citations omitted).

Under Section 760, a union "is *not* free to use its general funds for [political] advocacy purposes." *MCFL*, 479 U.S. at 252 (emphasis in original); *see also Austin*, 494 U.S. at 658. Rather, like the statutes at issue in *Austin* and *MCFL*—both

of which restricted corporate expenditures for electoral purposes—Section 760 dictates that only funds received in a manner that satisfies the statute's standards of voluntariness may be used for core political speech. The statute thus restricts on its face the extent to which funds lawfully in a union's possession may be used for election-related expenditures.[8] And, restrictions that "burden expressive activity" —like those that "stifle ... speech entirely"—"must be justified by a compelling state interest." *Austin*, 494 U.S. at 658 (applying strict scrutiny to requirement that corporations make electoral expenditures only from separate segregated funds); *see also id.* at 708 (Kennedy, J., dissenting) ("That the avenue left open is more burdensome than the one foreclosed is 'sufficient to characterize [a statute] as an infringement on First Amendment activities.'"); *MCFL*, 479 U.S. at 251-56 (plurality op.); *id.* at 266 (O'Connor, J., concurring).[9]

B. The efforts of petitioners and their *amici* to dispute that strict scrutiny is required are unavailing.

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[8] And, as in *Austin*, 494 U.S. at 657-58, and *MCFL*, 479 U.S. at 252-55, the statute also burdens the union's ability to engage in political speech through additional administrative requirements—here, in the form of the extensive accounting and recordkeeping obligations, including the requirement that the union separate the costs of its communications with its members on election-related subjects from the costs of its communications with its members on other subjects, that the trial court's permanent injunction required. *See* J.A. 209-10.

[9] Contrary to the Davenport petitioners' assertion, this Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003), does not say that "[o]nly a complete ban on political expression, not its mere regulation, raises serious First Amendment concerns." Davenport Br. at 42 (citing 540 U.S. at 204). To the contrary, *McConnell* applied strict scrutiny even though the measure before the Court was not a complete ban on expression. *See* 540 U.S. at 204-05. Indeed, in *FEC v. Beaumont*, 539 U.S. 146 (2003), decided just six months before *McConnell*, the Court noted: "It is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider it is when applying scrutiny at the level selected, not in selecting the standard of review itself." *Id.* at 162.

1. Contrary to *amicus* United States, the fact that—as to public-sector unions—the union's receipt of agency fees has been "facilitated by the state agency-shop laws," United States Br. at 29, does not distinguish the instant case from *Austin* and *MCFL*. In both of those cases the corporations regulated by the challenged statutes had "benefit[ed] from significant 'state-created advantages,'" *FEC v. Beaumont*, 539 U.S. 146, 160 (2003) (quoting *Austin*, 494 U.S. at 659), which enabled those entities to amass funds for political expenditures. *Austin*, 494 U.S. at 659-63, 665-66. Thus, on a parity to the Government's reasoning, the statutes challenged in *Austin* and *MCFL* were ones that set conditions on the grant to corporations of the "state-created advantages" noted by the Court. But the Court nevertheless subjected those restrictions on the corporations' political contributions and expenditures to strict scrutiny. *See id.* at 657-58; *MCFL*, 479 U.S. at 256.

Strict scrutiny therefore would be required in this case even if, as petitioners and their *amici* would have it, Section 760 should be viewed as simply placing a condition on the State's authorization, through its public-sector labor-relations laws, of an agency fee. *See, e.g.*, United States Br. at 12. But it is very much to the point that Section 760 *cannot* fairly be characterized in that manner. Section 760 does not target the public sector, in which it is indeed the State that authorizes the agency shop. Rather, Section 760 purports to bar not only public-sector but also private-sector unions from "using" agency fees for electoral purposes. It does so even though agency fees in the private sector, where labor relations are governed by federal law, are not the product of any state statutory authorization. For this reason as well, there is no basis for the suggestion that Section 760 should be subject to less than strict scrutiny on the theory that it is merely a condition on "state-created advantages."

2. Petitioners and their *amici* also err in suggesting that no First Amendment interest is implicated by Section 760

because that the provision is one that regulates unions' use of "other people's money." *See* United States Br. at 7-8, 14; Inst. for Justice Br. at 6, 12; American Leg. Exchange Council Br. at 4. *Austin* and *MCFL* belie that assertion. As the Washington Supreme Court correctly noted, Section 760 is not a limitation on the amount of the agency fee that a union may collect, but rather on the uses the union may make of that money; it "encumbers the use of . . . funds . . . [that] are *in the union's possession.*" Pet. App. 30a-31a (emphasis added). Of course, those funds were received from others, but the same was true in *Austin* and *MCFL*. In those cases, the asserted purpose of the challenged statutes was to "prevent[] an organization from using an individual's money for [electoral] purposes that the individual may not support." *MCFL*, 479 U.S. at 260; *see also FEC v. National Right to Work Comm.*, 459 U.S. 197, 207-08 (1982) ("*NRWC*"); *Austin*, 494 U.S. at 663. Nonetheless, the Court held that the statutes regulating the corporations' use of their general treasury funds for political speech were subject to strict scrutiny. *Id.* at 657-58; *MCFL*, 479 U.S. at 256.

3. In the same vein, petitioners contend that Section 760 implicates no First Amendment interest of the union, on the theory that "[w]hatever First Amendment rights the union has with regard to dues paid by its members, § 760 does not impact those rights because § 760 does not apply to members' dues." State Br. at 36-37; *see also* Davenport Br. at 2.

This attempt to deny that Section 760 has any impact at all on WEA's right to engage in political expression is fundamentally misplaced, for reasons we have already addressed. Whatever the original source of the moneys, Section 760 limits WEA's use, for electoral purposes, of funds that are lawfully in its possession, and this restric[illegible] on the union's ability to engage in political speech must be evaluated under the test of strict scrutiny.

But even on its own terms petitioners' argument fails for the simplest of reasons: it is precisely opposite to the State's

theory—and the trial court's ruling based on that theory—as to why WEA committed a violation of Section 760 in the first place. In the trial court, WEA argued that it had not violated the statute because it always had far more income from members' dues than the amount it spent for electoral purposes, and that under these circumstances it had not "used" agency fees for those purposes. *See* J.A. 161-63, 175-78, 192-93; R.P. 760-61. The trial court rejected that argument and did so on the theory advanced by the State and its accounting expert. The court held that once WEA received nonmembers' agency fees, in the amounts provided by state law, it violated Section 760 by making *any* expenditures from its treasury for the political purposes identified by Section 760—notwithstanding that nearly 85% of its treasury funds derived from membership dues payments and another 11% came from miscellaneous non-agency-fee sources—unless WEA were able to obtain the affirmative authorization for such expenditures from every one of its 3,000 to 4,000 nonmembers who paid agency fees. *See supra* pp. 10-11. Making electoral expenditures from WEA's general fund, the court said, was "a clear-cut *use* of the total funds available for the given purposes in proportion to the source of the funds." Pet App. 106a-107a (emphasis in original).

In short, the State prosecuted WEA, and the trial court found WEA to have violated the statute, based on WEA's use for political advocacy of its general treasury funds that the union previously had properly received from members as dues and secondarily, as a small percentage of the total, from agency fee payers pursuant to Wash. Rev. Code § 41.59.100. The State's prosecution theory and the trial court's ruling leave no room for petitioners' claim that Section 760 does not implicate the union's First Amendment right to engage in political speech.[10]

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[10] A footnote in the State's brief appears to suggest that WEA would not have violated Section 760 if it had refunded a portion of the agency

II. SECTION 760 IS NOT NARROWLY TAILORED TO ADVANCE A COMPELLING GOVERNMENTAL INTEREST

Whether Section 760 is defended as a measure to protect the integrity of the electoral process, or as additional protection for the First Amendment rights of individual nonmembers who pay agency fees, the interests assertedly justifying this regulation of unions' political speech cannot bear scrutiny.

A. Section 760 Is Not Narrowly Tailored To Further A Compelling Governmental Interest In The Integrity Of The Electoral Process

As the Washington Supreme Court emphasized, Section 760's purpose is to "protect the integrity of the election process." Pet. App. 22a. In this instance that purpose does not provide a compelling interest justifying the statute's restriction on speech for two independent reasons. First, Section 760 is fatally overbroad in that it regulates union contributions and expenditures in connection with ballot propositions. Second, the statute is perversely underinclusive in imposing an affirmative authorization requirement with respect to union nonmembers who already have an independent right to prevent the use of their fees for political purposes they oppose, but not with respect to corporate shareholders or members who have no such right.

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fee to nonmembers. State Br. at 40-41 n.10. Even assuming the correctness of that proposition notwithstanding the Washington Supreme Court's interpretation of the statute as regulating not the amount of the agency fee but the union's use of its funds, Pet. App. 30a-31a, it would not change the fact that Section 760 seriously burdens the union's First Amendment right to engage in political expression—both by requiring it to forgo a portion of the agency fee to which it was otherwise entitled if it wished to expend any funds for purposes of electoral advocacy, and by imposing elaborate record-keeping and accounting requirements, *see supra* note 8.

1. *The State Lacks A Compelling Interest That Justifies Restricting Union Contributions And Expenditures On Ballot Propositions*

Section 760 sweeps broadly and indiscriminately in regulating union spending "to influence an election or to operate a political committee." In particular, the statute reaches beyond the election of *candidates for political office* to encompass votes on *ballot propositions*. This broad reach of the statute is of the essence here, for the undisputed fact is that WEA made no candidate contributions or expenditures at all from its general treasury funds. Rather, WEA was found to have violated Section 760 principally because of its contributions with respect to various ballot propositions—including notably four statewide initiatives on issues of education policy and numerous local school district tax levy questions. *See supra* pp. 1-2, 11.[11] The State has no compelling interest that justifies restricting that form of political speech, and Section

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[11] Apart from this spending on advocacy with respect to ballot propositions, WEA also used treasury money for internal political communications with its own members and in-kind contributions to cover the administrative costs of its political action committee. Both of these uses came within the purview of Section 760, at least on the trial court's interpretation. That is so even though the Federal Election Campaign Act ("FECA"), for example, does not restrict union expenditures from treasury funds for a union's internal political communications with its members. *See* 2 U.S.C. § 441b(b)(2)(A); *see also United States v. Congress of Indus. Orgs.*, 335 U.S. 106, 121 (1948) (expressing the "gravest doubt" as to the constitutionality of any restriction on internal corporate or union political communications with members or shareholders). So too, FECA allows a corporation or union to use treasury funds to defray the administrative costs of its multi-candidate political action committee, *see* 2 U.S.C. § 441b(b)(2)(C), recognizing that such expenditures do not present the dangers that justify strict regulation of contributions to candidates. The Court need not explore the constitutionality of Section 760 as applied to these uses of WEA's general fund, however, because the statute's substantial overbreadth resulting from its application to ballot propositions is sufficient to render Section 760 unconstitutional.

760 therefore is facially invalid because of its substantial overbreadth.

a. In each of the cases, such as *Austin*, *Beaumont*, and *NRWC*, in which this Court has upheld statutes prohibiting corporations or unions from making election contributions or expenditures from general treasury funds, as in cases involving dollar limits on campaign contributions and expenditures, *e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 25-29 (1976); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390-95 (2000), the Court has relied on a rationale unique to candidate elections—the danger of corruption in the form of political debts, or the appearance thereof—which the Court specifically has stated is *not* applicable to ballot initiatives. *See NRWC*, 459 U.S. at 210 n.7 (noting that FECA applies only to candidate elections where, "unlike in referenda on issues of general public interest, there may well be a threat of real or apparent corruption"); *Beaumont*, 539 U.S. at 162 (noting that "strict solicitation limits" have been upheld as to candidate contributions but not as to other political expenditures).

Thus, where this Court has been confronted with statutes attempting to restrict contributions or expenditures from general treasury funds in connection with ballot initiatives, it has struck them down, even where a similar restriction as to candidate contributions would have been permissible. The leading case is *Bellotti*. There, the Court invalidated a statute that prohibited corporations from making treasury money contributions and expenditures to influence the vote on referendum proposals. The state sought to justify the prohibition by its "interest in sustaining the active role of the individual citizen in the electoral process and thereby preventing diminution of the citizen's confidence in government," 435 U.S. at 787, as well as its interest in "protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation." *Id.* While reaffirming the constitutionality of legislation prohibiting corporate or union contributions or expenditures from

general treasury funds with respect to the election of candidates for political office, *id.* at 788 n.26, the Court held that the governmental interest that justified such restrictions—"the problem of corruption of elected representatives through the creation of political debts," *id.*—did not support the attempt to restrict expenditures on ballot propositions: "However weighty these interests may be in the context of partisan candidate elections, they either are not implicated in this case or are not served at all, or in other than a random manner, by the prohibition" of expenditures on ballot propositions. *Id.* at 787-88; *see also id.* at 790 ("The risk of corruption perceived in cases involving candidate elections ... simply is not present in a popular vote on a public issue.").[12]

Three years after *Bellotti* was decided, the Court again drew a sharp distinction between candidate elections and ballot propositions. In *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), the Court invalidated an ordinance that placed a $250 limit on contributions to committees supporting or opposing ballot measures—notwithstanding that it had previously upheld limits on contributions to political *candidate* committees. 454 U.S. at 297 (citing *Buckley*, 424 U.S. at 26-27). The Court squarely held that *Buckley*'s rationale was not compelling with respect to ballot propositions:

> Whatever may be the state interest or degree of that interest in regulating and limiting contributions to or expenditures of a candidate or a candidate's committees

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[12] The Court has continued to cite *Bellotti*, in subsequent cases affirming restrictions on candidate contributions, as having established that such restrictions are not permissible when applied to expenditures in support of ballot initiatives. *See NRWC*, 459 U.S. at 210 n.7; *FEC v. National Conservative PAC*, 470 U.S. 480, 495-96 (1985) ("*NRWC* is consistent with this Court's earlier holding [in *Bellotti*] that a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates.").

> there is no significant state or public interest in curtailing debate and discussion of a ballot measure.

454 U.S. at 299.

Unlike candidate contributions, which do not necessarily convey a message on any particular public issue, *see Beaumont*, 539 U.S. at 161-62, and which present the danger of creating political debts, contributions or expenditures in support of or in opposition to ballot questions constitute pure issue advocacy. Not surprisingly, therefore, the federal government and the states that prohibit corporations and unions from making campaign contributions or expenditures from their general treasury funds do so only with regard to *candidate* elections—not ballot propositions.[13] As these jurisdictions have recognized, there is no compelling governmental interest that supports the restriction placed by Section 760 on political advocacy on ballot propositions, and that restriction plainly cannot withstand First Amendment scrutiny.

b. Thus, even if Section 760 could be applied constitutionally to candidate contributions or expenditures, which no one alleges WEA made from its general treasury funds—and even if it were to be assumed that Section 760 could be

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[13] *See* Campaign Legal Center ("CLC") Br. at 17 n.6 & Appendix. While CLC recognizes in the text of its brief that the statutes of the 14 states it identifies regulate only "labor union and corporate *candidate-related* political activity," *id.* at 17 (emphasis added), CLC's Appendix notes this limitation (or in some cases a limitation on contributions to either candidates or their political parties) for only eight of those states, while using the broad term "political contributions" to describe the statutes of the other six. It is the case, however, that *none* of these state restrictions applies to contributions or expenditures on ballot propositions. *See* Mich. Comp. Laws § 169.254(3); Mont. Code Ann. § 39-31-402(3); Pa. Stat. Ann. tit. 25, § 3253(a); *id.*, tit. 43, § 1101.1701; 2006 R.I. Pub. Laws 292, § 1 (amending R.I. Gen. Laws § 17-25-10.1(j) to delete applicability to ballot questions); S.D. Codified Laws § 12-25-2; Wyo. Stat. Ann. § 22-25-102(a). Similarly, the Federal Election Campaign Act places no restrictions on union and corporate political activity except as it relates to the election of candidates for political office. *See* 2 U.S.C. § 441b(a).

applied constitutionally to WEA's treasury money spending on internal membership communications and on administering its political action committee, *see supra* note 11—it is nonetheless apparent that the statute sweeps far too broadly in restricting WEA's political advocacy on ballot initiatives. Because Section 760 "reaches a substantial amount of constitutionally protected conduct," it is "facially invalid even if [it] also ha[s] legitimate application." *City of Houston v. Hill*, 482 U.S. 451, 459 (1987). As the record in this case makes abundantly clear, Section 760's "application to protected speech is substantial, 'not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications.'" *McConnell v. FEC*, 540 U.S. 93, 207 (2003) (quoting *Virginia v. Hicks*, 539 U.S. 113, 120 (2003)).

2. *The Statute's Underinclusiveness Demonstrates That Section 760 Is Not Narrowly Tailored To Further Any Compelling Interest In Ensuring That An Organization's Electoral Contributions And Expenditures Represent The Views Of Those Who Provide The Funds*

The perverse underinclusiveness of the statute's individual authorization requirement provides a second, independent reason why Section 760 cannot survive strict scrutiny. Section 760 provides for hyper-vigilance on behalf of union nonmember fee payers who have not exercised their independent right to object to the union's electoral spending but who may harbor an objection that they failed to assert, while turning a blind eye to corporate shareholders or members who harbor objections to the corporation's electoral spending and have been afforded no opportunity at all to make any such objection.

In *Bellotti*, this Court reasoned that, where a statute requires only one class of entities to establish that the funds the entity wishes to spend on politics represent the views of

the individuals who provided the funds, the exclusion of other classes of entities from such a requirement "undermines the plausibility of the State's purported concern for the persons who happen to be [constituents of the entities that are] covered by [the challenged provision]." 435 U.S. at 793. Particularly is this true where "minorities in [other] groups or entities may have [comparable] interests with respect to institutional speech . . . ." *Id.*

Here, the "plausibility" of the contention that Section 760 is designed to ensure that union electoral spending represents the views of the individuals whose money is being used is "undermine[d]," *id.*, by the absence of any requirement that corporations obtain individual authorization from their shareholders (in the case of business corporations) or members (in the case of nonprofit corporations such as those in *Austin*, *MCFL*, *NRWC*, and *Beaumont*) before spending "an individual's money for purposes that the individual may not support." *MCFL*, 479 U.S. at 260.[14] After all, *Austin* teaches that there is a *stronger* justification for such legislation in the case of corporations than in the case of unions—precisely because "[a]n employee who objects to a union's political activities . . . can decline to contribute to those activities, while continuing to enjoy the benefits derived from the union's performance of its duties as the exclusive rep-

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[14] Even viewed standing alone, the attempt to protect the electoral process against the apathy of union nonmembers who fail to take advantage of an opportunity to prevent the use of their fees for political purposes with which they disagree because they are "too busy" or "simply forget," State Br. at 34, or "do not understand" the notice sent to them, Davenport Br. at 7, is anything *but* compelling. It is one thing to hold that the government has a compelling interest in prohibiting corporate or union contributions or expenditures in connection with candidate elections financed by treasury money amassed from individuals who have been given no opportunity to object to that use of their funds; it would be quite another thing to hold that there is a compelling interest in ensuring that individuals who did not avail themselves of such an opportunity made a sufficiently reasoned decision in that regard.

resentative of the bargaining unit on labor-management issues." *Austin*, 494 U.S. at 665-66.[15]

This ready availability of a mechanism by which non-member fee payers can, without losing the benefits of union representation, avoid any obligation to pay the portion of union dues corresponding to political (and other non-germane) activities—in contrast to the situation of a corporate shareholder or member, who cannot prevent the corporation from using his or her money for political expenditures unless the individual is prepared to give up *all* benefits of association with the corporation, *see id.* at 663—means that "the funds available for a union's political activities more accurately reflects members' support for the organization's political views than does a corporation's general treasury." *Id.* at 665-66.

The State of Washington has turned *Austin* on its head by restricting union political spending through Section 760 while adopting no comparable restriction on corporate political spending. As in *Bellotti*, Washington's decision to concern itself with minority views within one type of participant in the

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[15] There are, of course, certain advantages that union members enjoy and nonmembers do not—such as the right to participate in the union's governance or in various union-provided group insurance or legal services programs—but those who have elected not to become union members have already chosen to forgo those benefits of union membership, and the additional step of objecting to paying for the union's political and other non-germane expenditures entails no further loss of any benefits. Unlike corporate shareholders who would be required to sell their shares in order to dissociate themselves from the corporation's political positions—and thus lose the investment advantages they presumably saw in holding such shares—nonmembers who pay agency fees lose *nothing* by choosing to become objectors. Thus, just as "[o]ne need not become a member of the Michigan Chamber of Commerce or the Sierra Club in order to earn a living," *Austin*, 494 U.S. at 710 (Kennedy, J., dissenting), the ability of an agency shop employee to earn a living without being forced to associate with the union's political views is fully protected by the availability of an objection under *Abood* and *Hudson*.

political process (unions) while allowing other participants—particularly corporations—to use all of their resources for electoral expenditures without regard to any minority views, "raises serious doubts about whether [the State] is, in fact, serving, with this statute, the significant interests" of protecting the integrity of elections. *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989). As Justice Scalia has put it, "a law cannot be regarded as protecting an interest 'of the highest order,' . . . and thus as justifying a restriction upon . . . speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* at 541-42 (Scalia, J., concurring); *see also City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424-26 (1993).

In the context of legislation regulating participation in the electoral process, underinclusiveness of the kind that plagues Section 760 is particularly problematic. Not only does it "diminish the credibility of the government's rationale for restricting speech in the first place," *City of Ladue*, 512 U.S. at 52, but it has the even more serious vice—whether intended or not—of "altering political debate by muting the impact of certain speakers," *Austin*, 494 U.S. at 704 (Kennedy, J., dissenting), and thus skewing the political process in a particular direction.

B. The Statute Was Not Intended To Protect The First Amendment Rights Of Individual Agency Fee Payers Nor Does It Do So

Notwithstanding that it is part of an Act governing election campaign practices, petitioners and their *amici* almost uniformly endeavor to defend Section 760 not as a measure aimed at protecting the integrity of the electoral process, but rather as if it were a statute whose purpose was to protect the First Amendment rights of the individual nonmembers who pay agency fees. Indeed, the Washington Supreme Court noted that "the only interest asserted" in that court as

justifying the restriction imposed by Section 760 "is additional protection for nonmembers' First Amendment rights." Pet. App. 26a. As we now show, however, providing such "additional protection" to individual agency fee payers was simply not the Washington electorate's purpose in adopting Initiative 134 and Section 760. And, even if it were, that justification for the statute can no more withstand strict scrutiny than could the justification based on protecting the integrity of the electoral process that we have just discussed.

1. *As The Washington Supreme Court Held, The Purpose Of The Statute Was Not To Enhance The Rights Of Individual Employees But To Protect The Public's Interest In The Integrity Of Elections*

The first fatal flaw in petitioners' attempt to justify Section 760 as a statute whose purpose is to provide additional protection for the First Amendment rights of nonmember agency fee payers is that this simply was *not* the statute's purpose. That is the authoritative—and clearly correct—holding of the Washington Supreme Court.

Addressing the same argument as petitioners advance here, the Washington Supreme Court held squarely:

> [T]here is no indication that in voting for I-134, the voters intended to provide more protection for nonmembers than that offered under federal constitutional principles. Rather, as we have previously stated, the principal thrust of I-134 was to protect the integrity of the election process from the perception that elected officials are improperly influenced by monetary contributions and the perception that individuals have an insignificant role to play. . . . *The intent of the statute was to protect the public, not individual employees.*

Pet. App. 22a-23a (emphasis added); *see also id.* at 12a. That explanation of what is and is not the purpose of Section 760 is authoritative. This Court "must, of course, accept the state court's view of the purpose of its own law . . . ." *U.S. Term*

Limits, Inc. v. Thornton, 514 U.S. 779, 829 (1995); *see also Romer v. Evans*, 517 U.S. 620, 626 (1996) (deferring to state supreme court's description of the statutory "objective" as "the authoritative construction").

The Washington Supreme Court's "view of the purpose of its own law" as having nothing to do with providing additional protection for the First Amendment rights of agency fee payers was, moreover, clearly correct. Petitioners point to no evidence whatever that Section 760 was enacted for the purpose of protecting the First Amendment interests of the individual nonmembers who pay agency fees, and—to the contrary—the Act's declarations of "findings," Wash. Rev. Code § 42.17.610, and "intent," *id.*, § 42.17.620; *see supra* pp. 5-6, confirm the view of the court below that "[t]he intent of the statute was to protect the public, not individual employees." Pet. App. 23a.

Furthermore, the ballot title submitted to voters[16] was addressed solely to election campaign activities; and the one-line description of Section 760 in the voter pamphlet distributed in connection with Initiative 134 "does not mention either the constitution or the protection of the nonmember." *Id.* at 11a-12a. Finally, Section 760—like all of the Act and the rest of Chapter 42.17—is administered, interpreted, and enforced by the PDC, an administrative agency charged solely with overseeing Washington's campaign finance and disclosure laws, *see* Wash. Rev. Code § 42.17.360, but which has no authority with regard to matters of public employee labor relations.

The scope of Section 760, too, demonstrates that the statute's purpose is to regulate the electoral process, not to

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[16] "Shall campaign contributions be limited; public funding of state and local campaigns be prohibited; and campaign related activities be restricted?" *See Washington Fed'n of State Employees v. State*, 901 P.2d 1028, 1031 (Wash. 1995).

provide additional protection for the rights of agency fee payers. The statute applies only to unions' electoral expenditures and not to any of the other political or ideological expenditures unions typically make that equally implicate nonmembers' First Amendment rights against compelled speech. Most strikingly, the statute restricts expenditures on ballot initiatives but has no application to expenditures for lobbying the legislature, despite the fact that the initiative process and the legislative process are simply alternative methods of enacting legislation. Thus, had the legislation on vouchers, charter schools, cost-of-living adjustments for educators, and class size on which WEA made expenditures been proposed in the legislature rather than through the initiative process, WEA would not have violated Section 760 in spending money to support or oppose those measures.

In *Bellotti*, the Court found that the asserted purpose of "protect[ing] corporate shareholders . . . by preventing the use of corporate resources in furtherance of views with which some shareholders may disagree," 435 U.S. at 792-93, was belied by the "self-evident" underinclusiveness of the statute, under which "[c]orporate expenditures with respect to a referendum are prohibited, while corporate activity with respect to the passage or defeat of legislation is permitted." *Id.* at 793; *see also Austin*, 494 U.S. at 686 (Scalia, J., dissenting) (finding protection of shareholder interests an "implausible explanation" for a statute prohibiting corporate independent expenditures for candidates but otherwise "permit[ting] corporations to take as many ideological and political positions as they please"). That Section 760 similarly regulates union spending on ballot propositions but not legislative lobbying further supports the authoritative determination of the court below that the statutory concern is with the integrity of the electoral process—and not with providing additional protection for individual nonmembers' First Amendment rights.

That conclusion should end the inquiry. This Court has made clear, in applying strict scrutiny to discriminatory classifications under the Equal Protection Clause, that a hypothetical interest "based upon speculation about what 'may have motivated' the legislature" is insufficient: "To be a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose' . . . ." *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 & n.16 (1982)); *see also United States v. Virginia*, 518 U.S. 515, 535-36 (1996). In the First Amendment context, where "the State's highest court has not shed additional light on the statute's purpose" the Court sometimes has been willing to discern that purpose from the statute's "text and history." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567-68 (1991). Here, the Washington Supreme Court, by authoritatively explicating the statute's purpose, has made it unnecessary to undertake that inquiry—and in any event the statute's "text and history" fully support that court's determination.

We know of no case in which this Court has upheld a statute against First Amendment challenge on the basis of an allegedly compelling governmental interest that the state supreme court authoritatively determined was *not* the statute's "actual purpose." Thus, the Washington Supreme Court's well-supported determination that it was *not* the objective of the Washington electorate, in enacting Initiative 134 and Section 760, to "provide more protection for non-members than that offered under federal constitutional principles," Pet. App. 22a, is fatal to petitioners' attempt to justify Section 760 on that ground.

2. *No WEA Agency Fee Payer Is Forced To Support Political Causes With Which He Or She Disagrees, And There Is No Compelling Interest In Protecting Nonmembers Against Being "Too Busy" Or "Forgetting" To Assert Their Right Not To Provide Such Support*

Even if Section 760 had in fact been adopted with the purpose of protecting nonmembers' First Amendment rights against compelled speech, that purpose would not provide a compelling justification for the statute's infringement on WEA's right of political expression. In the first place, the underinclusiveness problem, which we have just discussed, in itself shows that the statute is not narrowly tailored to serve a compelling interest, for "a law cannot be regarded as protecting an interest 'of the highest order,' . . . and thus as justifying a restriction upon . . . speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *Florida Star*, 491 U.S. at 541-42 (Scalia, J., concurring).

But there is another reason why Section 760 serves no compelling interest in protecting fee payers' constitutional rights: this First Amendment interest is independently protected by the *Hudson* procedures required by this Court's cases, and the remaining interests on which petitioners rely are insubstantial.

a. The dissenting opinion in the court below opens with Thomas Jefferson's aphorism that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical." Pet. App. 34a (Sanders, J., dissenting). Jefferson was right, of course, and this Court has subsequently held that when backed by state action such compulsion is not only sinful but unconstitutional. *Abood*, 431 U.S. at 232-37.

But the injury recognized by Jefferson lies in being "*compel[led]*" to support opinions an individual opposes; and the constitutional right recognized by *Abood* and this Court's

subsequent cases is the right not to be "require[ed] . . . as a condition of holding a job" to finance union political and ideological activities. *Id.* at 235. These activities must be financed only from the dues and fees of "employees *who do not object* to advancing those ideas and who are *not coerced into doing so against their will* by the threat of loss of governmental employment." *Id.* at 235-36 (emphasis added); *see also Hudson*, 475 U.S. at 301-02; *Lehnert*, 500 U.S. at 517. The nonmembers' First Amendment right therefore is that they "not be charged *over their objection*," *id.* at 519 (emphasis added), for their share of the union's political and other expenditures not germane to collective bargaining. This is a right against compelled speech, and where the nonmember is permitted to avoid supporting the union's political and other nonchargeable activities simply by voicing an objection, *there is no compelled speech.*[17]

There is not, nor can there be, any contention in this litigation that this First Amendment right of any nonmember has been violated or would be violated absent the provisions of Section 760. In accordance with this Court's decisions as to what is necessary to comply with the dictates of the First Amendment, WEA annually sends each nonmember a "*Hudson* notice" in which the union explains what it spends its money for and invites the nonmember to inform it if he or she objects to paying the portion of the fee that corresponds to the union's non-germane expenditures. Any nonmember who responds by noting an objection receives a refund, with interest, of that portion of the fee. *See supra* pp. 3-5. There is no allegation in this litigation that WEA failed to follow

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[17] The Davenport petitioners and several of the *amici* question the rule that "dissent is not to be presumed." *See* Davenport Br. at 31-38. But, as the United States correctly recognizes, it is firmly established that "unions may constitutionally use the fees for political purposes *unless a dissenter objects to such use*." United States Br. at 8 (emphasis added). The State agrees: "[N]onmembers are required to object in order to claim First Amendment protection, and 'dissent is not to be presumed.'" State Br. at 29.

these procedures scrupulously, or that WEA's procedures were in any respect inadequate to comply with the prophylactic measures this Court prescribed in *Hudson*.[18]

In short, no employee required to pay agency fees to WEA has been compelled—or in the absence of Section 760 would be compelled—to contribute to any union electoral activities. As the Washington Supreme Court correctly put it, "[a]n employee who is given a simple and convenient method of registering dissent has not been compelled to support a political cause and has not suffered a violation of his or her First Amendment rights." Pet App. 17a.[19]

b. Given that nonmember fee payers are already protected against being compelled to support political causes with which they disagree, the State defends Section 760 as a measure designed to protect nonmembers who "are too busy to take the steps necessary to communicate their objections to the union, or . . . simply forget to opt-out within the thirty-day deadline." State Br. at 34. Similarly, the Davenport petitioners note that nonmembers might not assert an objection

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[18] If there were any such inadequacy, of course, the affected nonmembers would have a remedy either through the arbitration procedure mandated by *Hudson*, *see* 475 U.S. at 307-08 & nn.20-21, or through an action under 42 U.S.C. § 1983 in federal court. *See Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998). Indeed, the Davenport petitioners are members of a class that previously brought such litigation against WEA, and the *Hudson* procedures WEA currently employs are those prescribed in a 1998 settlement agreement that resolved that lawsuit. *See* Def. Trial Ex. 69; R.P. 247-51.

[19] We are at a loss to ascribe any meaning to the distinction between "*maximum* First Amendment rights" and "*minimum* First Amendment rights" asserted by one *amicus*. CLC Br. at 4 (emphasis in original). While a state is of course free, as the court below recognized, to "provide greater protection to its citizens" than the federal Constitution demands, Pet. App. 22a, in doing so it is not somehow enlarging the constitutional right but rather is protecting some interest beyond that constitutional right. The relevant question—to which we next turn—is thus the substantiality of *that* interest, not of the constitutional right that, by definition, is already protected.

"because they do not receive [the *Hudson* packet], the packet comes at the busiest time of the school year, they do not understand it, or they put it away for later," Davenport Br. at 7 (citing petitioners' depositions); thus, in their view, Section 760 guards against "unwitting" or "accidental" support of political spending with which a nonmember might disagree, *id.* at 28, and protects the nonmembers against their own "inertia." *Id.* at 29.[20]

The notion that a union's right to engage in political expression can be restricted on the basis of a state interest in protecting people against being "too busy," too indifferent, or simply forgetting to assert their rights cannot withstand analysis; if there is any such interest at all, it surely cannot be described as "compelling." And, in any event, there would surely be other means of protecting such interests that are far more narrowly tailored than is Section 760. For example, if the asserted problem is that nonmembers do not understand the *Hudson* notice, it would be within the authority of the State (with respect to the public sector) to prescribe additional requirements for a union's *Hudson* notice designed to make it clearer.

Nor is there any compelling interest in protecting people from being required simply to speak up if they wish to take advantage of an exemption to which they are entitled. The

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[20] The State's assertion that an affirmative authorization requirement "ensures" that "the wishes of the nonmembers who pay the fees" will be effectuated, State Br. at 34, is flatly contradicted by the Davenport petitioners' explanation of how "the power of human inertia" results in "people often irrationally refrain[ing] from choosing options that are of objective benefit to them." Davenport Br. at 29. That principle obviously would operate under an affirmative authorization scheme just as much as under an objection procedure. A nonmember who, if she gave the matter any consideration, might be delighted to have the union spend its money to help enact initiatives that would give education employees cost of living adjustments (Initiative 732) or reduce class size (Initiative 728), could well—because the notice arrived at a busy time of the year, or for any of the other reasons cited by petitioners—fail to provide the affirmative authorization that would correspond to her wishes.

State contends that Section 760 protects the interests of nonmembers who "simply want to remain silent" but who are "force[d] . . . to speak" if they wish to assert their right to object. State Br. at 34; *see also* Mackinac Br. at 5 ("nonmembers must forfeit their right to silence and express their objection, or they will lose their right to withhold their wages from the support of political activities with which they may disagree"). But examples abound of situations where people must speak up if they wish to take advantage of their First Amendment rights against compelled speech. Thus, the automobile owner who objects to displaying a state-mandated motto on his license plate, *cf. Wooley v. Maynard*, 430 U.S. 705 (1977), cannot avoid doing so unless he takes some action that reveals his objection. The student who wishes to be excused from participating in the pledge of allegiance, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), must make that wish known in some way. There is a fundamental difference between compelling an individual to convey "a message he disagrees with," *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005)—which is what the First Amendment protects against—and merely requiring a person who objects to engaging in particular speech to make that objection known. It is frivolous to suggest that a "compelled speech" issue arises from requiring a person to say what he wants done, so that the government (or in this case the union) can carry out his wishes.

Some of the *amici* go to great lengths—making greater use of their imaginations than of the record—in attempting to discover reasons why nonmembers must be protected from having to voice their objections. It is asserted, for example, that "[u]nder an opt-out scheme, the nonmember must stand up amid disagreeing peers, her boss, and union officials and state yet again a desire to not 'associate' with WEA and its political activity." NFIB Br. at 22; *see also id.* at 27; Inst. for Justice Br. at 12-17. By contrast, the merit of an "opt-in" procedure is said to be that it "does not require [the nonmember] to disclose

the precise nature of her political beliefs to those around her." *Id.* at 17. These arguments are doubly flawed. First, these *amici* display no familiarity with how the *Hudson* process works, as reflected in the record of this case. A fee payer wishing to object does not need to make any statement in public, let alone explain "the precise nature of her political beliefs." Rather, the fee payer receives the *Hudson* notice in the mail and objects by simply mailing a letter to WEA headquarters stating a general objection, without any need to explain the nature or extent of the objection or to set forth the nature of his or her political beliefs. *See supra* p. 4. Second, that being so, the differences between an "opt-out" and an "opt-in" system posited by *amici* are imaginary. A non-member who makes a general objection, through a letter mailed to the union's administrative offices, is in no different situation, in terms of any stigma that might attach to that action, than would be a nonmember who refused to agree to a union representative's request for "affirmative authorization" of union electoral spending.[21]

In short, the nonmembers' First Amendment interests are, without Section 760, independently protected by this Court's decisions in *Abood* and its progeny, and the additional interests asserted as justifying the statute are too insubstantial to justify the restriction Section 760 imposes on WEA's right to engage in political advocacy.

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[21] Although it should not be necessary to do so, we note in this connection, in response to the assertions about threats of violence and the like that are found in several of the *amicus* briefs, that there is nothing whatever of this kind to be found in the record of this case, or in the "legislative history" of Initiative 134.

III. HOLDING SECTION 760 UNCONSTITUTIONAL DOES NOT CALL INTO QUESTION ANY OTHER STATE OR FEDERAL AGENCY SHOP OR CAMPAIGN FINANCE REGULATION

Petitioners' intimations that affirming the judgment below would undermine longstanding state and federal laws governing agency fees and campaign finance are unfounded. The unconstitutionality of Section 760 does not rest on any assertion of a constitutional right of unions to receive agency fees from nonmembers, and striking down this *sui generis* Washington statute will not imperil any state or federal campaign finance regulation.

A. The states have broad authority to regulate labor relations in their public-sector employment, and they have chosen a wide variety of approaches to doing so. A significant minority of the states have declined to follow the lead of Congress (in regulating the private sector) and do not provide for collective bargaining in public-sector employment at all. Of those that have established a system of collective bargaining—which in American labor law universally is based on the principle of exclusive representation of all members of a bargaining unit by the union chosen by the majority—most have recognized that provision for an agency fee is an appropriate and proper part of that system. Others have not done so, however, and there is nothing in the Constitution that requires them to. Any union right to collect an agency fee is a matter of statutory authorization, not constitutional principle, and a state is thus constitutionally free to prohibit or to decline to authorize an agency fee. *See Lincoln Federal Labor Union 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949).

While many of the states that have authorized a public-sector agency fee have, like Washington, set the fee at an amount equal to the dues required of union members, others have authorized an agency fee that is defined so as to en-

compass only the portion of union dues that corresponds to the union's expenditures on activities germane to collective bargaining—thus excluding a wide variety of union expenditures not only on political and ideological activities but also expenditures for members-only benefits, international programs, public relations activities, charitable donations, and the like. *E.g.*, N.M. Stat. Ann. § 10-7E-4(J); Pa. Stat. Ann. tit. 43, § 1102.2; 5 Ill. Comp. Stat. 315/3(g); Md. Code Ann., Educ. § 6-504(d)(3)(iv)(l). Other states have approximated that result by setting the agency fee at a fixed percentage of union dues. *E.g.*, Minn. Stat. § 179A.06(3) (limiting agency fee to 85% of regular membership dues); N.J. Stat. Ann. § 34:13A-5.5(b) (same); Vt. Stat. Ann. tit. 3, § 902(19) (same). There is no question that a state is acting within its constitutional authority in imposing such limits on the extent to which it is willing to provide by law for a required payment of an agency fee to the exclusive representative by bargaining-unit employees who have elected not join the union.[22]

Through statutory schemes such as these, a state has ample authority, consistent with the First Amendment, to design an agency fee system for its public sector that ensures that no nonmember who pays an agency fee—whether or not an

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[22] A statutory scheme that authorizes an agency fee limited to expenditures germane to collective bargaining (or that accomplishes roughly the same end by setting the fee at a fixed percentage of union dues) can be readily justified on the basis of a state's permissible judgment that its interest in promoting labor peace and preventing "free riding" extended only to union activities germane to collective bargaining. If, on the other hand, a state were to authorize an agency fee that included expenditures for some activities not germane to collective bargaining but excluded others, First Amendment issues of content discrimination might arise, depending on the nature of the distinctions drawn by the state and the reasons for those distinctions. But there is no need in this case to decide what level of scrutiny would apply and what governmental interests would be sufficient to justify such a statutory scheme.

"objector"—will be required to support a union's political and other expenditures not germane to collective bargaining.

That is not, however, what Washington has done here. Like a number of other states, Washington has provided in its public-employee labor relations statutes for an agency fee in an amount equal to union dues. Wash. Rev. Code § 41.59.100. As the Washington Supreme Court recognized in its authoritative interpretation of Section 760, "the statute acknowledges that the fees are in the union's possession but places restrictions upon the *use* of the union's funds for political speech." Pet. App. 30a-31a (emphasis in original). That is to say, what Section 760 does is to limit—in a way that is content-discriminatory and targets speech that is at the core of what the First Amendment protects—the use to which a union may put moneys that are lawfully in its possession.

That Section 760, as the Washington Supreme Court held, is a restriction on a union's use of the funds properly in its possession, rather than a limitation on the amount of the agency fee that public-sector unions are authorized by Washington public-sector employment laws to collect, is made crystal clear by the fact that Section 760 on its face runs not only to public-sector unions but also to unions in the private sector, as to which the State has no role in authorizing the amount of the agency fee. Section 760, quite clearly, is not conceived as a limitation or condition on the agency fee the State is willing to authorize in public-sector employment; rather, it is a regulation of electoral spending by any union, public or private, that receives agency fees—whether or not the State of Washington played any role in authorizing the union to assess and collect such fees.[23]

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[23] It is, of course, a separate question—not presented by this case—whether the application of this regulation to the private sector is pre-empted by the National Labor Relations Act or the Railway Labor Act. But it bears noting that, although a number of states have exercised the authority granted them by the NLRA to "prohibit[]" union shop or agency

The extent to which a state constitutionally may limit the amount of the agency fee it is willing to authorize its public-sector unions to collect is, in short, not a question that is presented by Section 760's restriction on unions' use of their funds for political speech.[24]

B. Similarly—and contrary to the assertion of some of the opposing briefs—holding Section 760 unconstitutional does not call into question any federal or any other state campaign finance law. *Amicus* Campaign Legal Center offers an appendix listing "opt-in" campaign finance laws from fourteen states, "all of which would seemingly be subject to challenge and invalidation if the reasoning of the Washington Supreme Court was followed." CLC Br. at 17-18; *see id.* at 17 n.6 & Appendix. As we have previously discussed, however, none of these statutes share the characteristics that make Section 760 constitutionally objectionable. All of them, as CLC recognizes, apply only to "*candidate-related* political activity," *id.* at 17 (emphasis added); none limits union spending on ballot questions or internal communications. *See supra* p. 31 & note 13. And, with the exception of a Montana agency fee statute, all of them impose their restrictions even-handedly on unions and corporations. *See* CLC Br., Appendix.

The professed concerns regarding the federal campaign finance laws are equally hollow. It is highly misleading to say without further elaboration, as do the Davenport petitioners, that "FECA prohibits unions from using their general funds for political contributions and expenditures . . . ."

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shop arrangements in the private sector, 29 U.S.C. § 164(b); *Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746 (1963), to our knowledge no state has presumed to regulate either the purposes for which private-sector agency fees may be used or the amounts at which such fees may be set.

[24] Authorizing unions to collect an agency fee is not an exercise of the State's spending power, and cases dealing with government spending and tax subsidies, *e.g.*, *Regan v. Taxation With Representation*, 461 U.S. 540 (1983); *Rust v. Sullivan*, 500 U.S. 173 (1991), are therefore inapt.

Davenport Br. at 41. Like the state statutes just discussed, FECA prohibits the use of treasury funds for contributions and expenditures for candidates for public office; it has no application to contributions and expenditures on ballot questions, and it specifically exempts expenditures for internal communications and for PAC administration. 2 U.S.C. § 441b(a), (b)(2)(A), (C). Equally to the point, FECA applies its prohibitions on the use of treasury funds to unions and corporations alike. *Id.*, § 441b(a).[25]

In short, the states have ample authority under the Constitution to regulate union and corporate political contributions and expenditures as is necessary to further the compelling governmental interest in protecting the integrity of the electoral process by "[p]reventing corruption or the appearance of corruption," *Austin*, 494 U.S. at 658, and that conclusion would in no way be called into question by a judgment of this Court that Section 760 impermissibly burdens WEA's First Amendment right to speak, with whatever funds are lawfully in its treasury, on ballot measures of vital political concern to the education employees it represents.

CONCLUSION

The judgment of the Supreme Court of Washington should be affirmed.

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[25] Nor do statutes that regulate public-sector payroll deductions have anything to do with Section 760. A state, in administering the use of its payroll system, "is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license." *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). Where that is so, "its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject." *Id.*; *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (upholding school district's limitation on access to internal mail system). The restrictions on speech imposed by Section 760, on the other hand, "cannot be upheld by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property." *Consolidated Edison*, 447 U.S. at 540.

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APPENDIX

APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. I

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Washington Educational Employment Relations Act

Wash. Rev. Code § 41.59.060. Employee rights enumerated—Fees and dues, deduction from pay.

> (2) . . . If an agency shop provision is agreed to and becomes effective pursuant to RCW 41.59.100, except as provided in that section, the agency fee equal to the fees and dues required of membership in the exclusive bargaining representative shall be deducted from the salary of employees in the bargaining unit.

Wash. Rev. Code § 41.59.090. Certification of exclusive bargaining representative—Scope of representation.

> The employee organization which has been determined to represent a majority of the employees in a bargaining unit shall be certified by the commission as the exclusive bargaining representative of, and shall be required to represent all the employees within the unit without regard to membership in that bargaining representative . . . .

Wash. Rev. Code § 41.59.100. Union security provisions—Scope—Agency shop provision, collection of dues or fees.

> A collective bargaining agreement may include union security provisions including an agency shop, but not a union or closed shop. If any agency shop provision is agreed to, the employer shall enforce it by deducting

from the salary payments to members of the bargaining unit the dues required of membership in the bargaining representative, or, for nonmembers thereof, a fee equivalent to such dues.

Washington Fair Campaign Practices Act

Wash. Rev. Code § 42.17.020. Definitions.

(4) "Ballot proposition" means any "measure" as defined by RCW 29A.04.091, or any initiative, recall, or referendum proposition proposed to be submitted to the voters of the state or any municipal corporation, political subdivision, or other voting constituency from and after the time when the proposition has been initially filed with the appropriate election officer of that constituency prior to its circulation for signatures.

(17) "Election" includes any primary, general, or special election for public office and any election in which a ballot proposition is submitted to the voters . . . .

(22) "Expenditure" includes a payment, contribution, subscription, distribution, loan, advance, deposit, or gift of money or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure. . . .

(38) "Political committee" means any person . . . having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.

Wash. Rev. Code § 42.17.610. Findings.

The people of the state of Washington find and declare that:

(1) The financial strength of certain individuals or organizations should not permit them to exercise a disproportionate or controlling influence on the election of candidates.

(2) Rapidly increasing political campaign costs have led many candidates to raise larger percentages of money from special interests with a specific financial stake in matters before state government. This has caused the public perception that decisions of elected officials are being improperly influenced by monetary contributions.

(3) Candidates are raising less money in small contributions from individuals and more money from special interests. This has created the public perception that individuals have an insignificant role to play in the political process.

Wash. Rev. Code § 42.17.620. Intent.

By limiting campaign contributions, the people intend to:

(1) Ensure that individuals and interest groups have fair and equal opportunity to influence elective and governmental processes;

(2) Reduce the influence of large organizational contributors; and

(3) Restore public trust in governmental institutions and the electoral process.

Wash. Rev. Code § 42.17.760. Agency shop fees as contributions.

A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.